Supreme Court, U.S.
FILED
MAR 28 1997
OFFICE OF THE CLERK

(15)

No. 96-454

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

ASSOCIATES COMMERCIAL CORPORATION,
Petitioner,

v.

ELRAY RASH and JEAN E. RASH,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS, INC. in support of Respondents

NORMA L. HAMMES*
JAMES J. GOLD
GOLD and HAMMES
1570 The Alameda #223
San Jose, California 95126
(408) 297-8750
Counsel for Amicus Curiae

* Counsel of Record

45 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

I. QUESTION PRESENTED

Whether, when a debtor proposes to retain a secured creditor's collateral under the cramdown powers of chapter 13 of the Bankruptcy Code, the amount required to be paid on account of the creditor's secured claim is limited to the value that the secured creditor could have obtained if it had sold the collateral at foreclosure.

II. TABLE OF AUTHORITIES

III. PERTINENT STATUTORY PROVISIONS

The Appendix includes the text of the following pertinent statutory provisions: 1898 Bankruptcy Act: Chapter X §§ 616(1) & (10); and 1978 Bankruptcy Code: §§ 361, 506(a), 1322(b)(2), 1325(a)(5).

IV. INTEREST OF AMICUS CURIAE

Incorporated in 1992, NACBA is a non-profit organization of more than 700 consumer bankruptcy attorneys nationwide. Member attorneys represent debtors in an estimated 200,000 bankruptcy cases filed each year in the United States. NACBA is the only national association of attorneys organized for the purpose of protecting the rights of consumer bankruptcy debtors.

NACBA's members and their clients throughout the country have a vital interest in the outcome of this case. This Court's decision in this case will determine whether or not Chapter 13 plans are feasible in many thousands of cases each year. A significant percentage of Chapter 13 cases filed involve the payment of secured claims pursuant to 11 U.S.C. § 1325(a)(5). Those cases will be directly affected by this decision.

Counsel for both Petitioner and Respondents have consented to the filing of this *amicus curiae* brief.

V. STATEMENT OF FACTS

Elray and Jean Rash (hereinafter called "Rash") made a $16,000 down payment and financed the remaining purchase price of a commercial truck. Associates Commercial Corporation (hereinafter called "Associates") bought the loan and associated security interest from the original lender. According to normal practice in the trucking business, Rash then leased his vehicle to a transportation company for which he drove the truck. Rash's income from operation of the truck came from the transportation company primarily in the form of lease payments. Associates did not have any security interest in Rash's lease with the transportation company. Associates held only a security interest in the vehicle itself and not in the rents, profits, or proceeds from the use of the truck. After paying Associates for

almost three years, Rash encountered significant financial problems and was forced to file a petition for Chapter 13 relief. 90 F.3d at 1038-39.

The value of Associates' secured claim became an issue in connection with the confirmation of Rash's Chapter 13 plan. 11 U.S.C. § 1325(a)(5)(B)(ii) requires that if a Chapter 13 debtor retains property securing a claim, the Chapter 13 plan must provide for payments to the creditor in the amount of the secured claim. If the debtor elects to surrender the property securing the claim through the Chapter 13 plan, § 1325(a)(5)(C) applies and no valuation of the secured claim is undertaken. The secured claim is valued for purposes of § 1325(a)(5) (confirming a Chapter 13 plan) *only* if the property is to be retained and used by the debtor. The amount to be paid to the creditor (the allowed secured claim) is valued pursuant to 11 U.S.C. § 506(a).

The "cram down" or "strip down" provision in a reorganization plan limits the portion of the debt which must be fully repaid to the amount of the secured claim. 11 U.S.C. § 1322(b)(2) further authorizes Rash to modify Associates' rights to accomplish the § 1325(a)(5)(B) cram down.

VI. SUMMARY OF ARGUMENT

Before the 1978 Bankruptcy Code was adopted, secured creditors were not entitled to bankruptcy estate distributions based upon their secured claims. For consumer debtors, § 1325(a)(5)(B), adopted in 1978, provided the first clear statutory right to retain property securing claims and pay for it through the Chapter 13 plan. (See Appendix for statutory provision).

Amicus contends that the value of Associates' secured claim is the amount Associates would expect to net upon a hypothetical surrender of Rash's truck on the bankruptcy petition date. This amount is not a "liquidation value" or a "forced sale value" which would be obtained by a bankruptcy trustee. It is the amount Associates routinely realizes on repossessed or surrendered vehicles *outside* of bankruptcy in dispositions under applicable state or non-bankruptcy law. Associates asserts that the value of its secured claim for purposes of § 1325 should be what Rash

would pay for an identical replacement vehicle, or the "retail" value.

The plain meaning of § 506(a) clearly supports Rash's position: the secured claim is the value to the creditor of its interest in the estate's interest in the property. See Appendix for statutory provision. The "creditor's interest" can have no meaning if the debtor's interest is the interest being measured. If Congress had intended the secured claim to be measured by the value to the debtor of retaining or using the vehicle, Congress could have simplified § 506(a) to read "an allowed claim of a creditor ... is a secured claim to the extent of the value of the use to the debtor of the property securing the claim." See similar language in § 1325(a)(5)(C). (See Appendix for statutory provision). Congress has considered and rejected the meaning Associates proposes several times, see *infra*.

Any confusion regarding the meaning of § 506(a) can be resolved by analyzing the various contexts and purposes in which it may be utilized, including those other than determining the amount that must be paid on a secured claim in a Chapter 13 plan pursuant to § 1325. Most courts have found the first sentence of § 506(a) to be unambiguous, and the second sentence of § 506(a) also has meaning when analyzed in connection with other sections of the Bankruptcy Code. Contrary to the position taken by Associates, the second sentence does not mean that "retail" value applies in the case at hand. However, if this Court finds the statute to be ambiguous, the legislative history of the 1978 Bankruptcy Code and the pre-Code rule also clearly support Rash's position.

Hundreds of years of legal tradition provide the origin for the pre-Code rule. The "bankruptcy rule," dating back to Henry VIII, provides that in order to share in unsecured dividends, secured creditors were first required to repossess and dispose of the security and apply the net proceeds to the debt. Actual application of net proceeds of the repossession was the rule when liquidation was the only bankruptcy relief available.

With the introduction of bankruptcy reorganizations in response to the depression of the 1930s, debtors were allowed to retain secured collateral. As interpreted in the 1930s, the "bank-

ruptcy rule" determined the secured claim amount by deducting the expected proceeds from a hypothetical judicial sale as established by appraisal. The creditor was entitled to file a claim for the remaining portion of the debt, the unsecured claim. In a later development, the creditor was allowed to bid at a subsequent sale of the property up to the full amount of its claim. This allowed the creditor to bid in an amount that it would expect to recover in a hypothetical repossession.

As discussed below, to diverge from the "bankruptcy rule" and value Associates' secured claim at higher than the expected net recovery on a hypothetical surrender of the property would result in an ***elimination*** of any dividends to be paid to Rash's general unsecured creditors. 90 F.3d at 1055, fn. 24. If a debtor is not able to propose a feasible Chapter 13 plan, he will be forced to elect Chapter 7 relief instead. If the debtor resorts to Chapter 7 relief, the unsecured creditors will invariably receive no dividends and the partially-secured creditor (e.g., Associates) will probably repossess the vehicle because the debtor cannot maintain the contractual payments. The debtor will no longer have transportation to work (or in Rash's case -- the means of directly generating income). Correspondingly, the creditor will have the repossessed vehicle which is worth to it only what Rash proposes to pay through the plan.

This is precisely the result Congress intended to avoid by enacting § 1325(a)(5)(B). As far back as the 1930s, Congress concluded that because of the losses suffered by all parties in a straight bankruptcy (Chapter 7 liquidation), reorganization of the debtor would frequently be in the best interest of the debtor and creditors alike.

VII. ARGUMENT

A. 11 U.S.C. § 1322(b)(2) ALLOWS RASH'S CHAPTER 13 PLAN TO MODIFY THE RIGHTS OF ASSOCIATES

Rash's power to modify Associates' rights as provided in his Chapter 13 plan can be traced back to the Bankruptcy Act of 1898, as amended in 1938. Composition reorganization plans which discharged a portion of the unsecured debt were not commonly utilized until the 1930s, culminating with the amend-

ment of the 1898 Bankruptcy Act in 1938. See *Dewsnup v. Timm*, 502 U.S. 410, 112 S.Ct. 773, 778-9 (1992), and the 1898 Bankruptcy Act: 11 U.S.C. Chapter X § 616(1) & (5).

The Bankruptcy Code enacted in 1978, provided an important change empowering consumer debtors to modify the rights of partially secured creditors and pay secured claims in bankruptcy. §§ 1322 and 1325. Under the 1978 Code, §§ 1322 and 1325 closely mirror the provisions of § 616(1) and (10) of the 1898 Act.

B. 11 U.S.C. § 1325(a)(5) ALLOWS RASH TO RETAIN ASSOCIATES' SECURITY IF ASSOCIATES IS COMPENSATED FOR ITS SECURED CLAIM

If a financially distressed debtor files a Chapter 13 bankruptcy case, the debtor is permitted to retain and use his/her property, including property which secures a creditor's claim. With regard to secured debt, the debtor must comply with the requirements of 11 U.S.C. § 1325(a)(5) for the Chapter 13 plan to be confirmed.

Because Associates did not accept the plan, Rash's plan shall be confirmed by the court if Rash either surrenders the property pursuant to § 1325(a)(5)(C) or proposes a plan which complies with § 1325(a)(5)(B). Section 1325 provides the two alternative methods, (B) and (C), of compensating a secured creditor for its security interest. If the debtor elects the option provided in § 1325(a)(5)(C), the secured creditor will receive its security, the value of which to the creditor will be the net recovery on the creditor's actual disposition of the property securing the lien -- meaning that it is valued from the creditor's perspective. If the debtor elects to retain and use the property, the creditor retains its lien and becomes entitled to payment of the present value of the secured claim from the bankruptcy estate over time.

Those two methods of compensating the creditor for its secured claim, in cash or in kind, should logically result in equivalent compensation to the secured creditor. The equivalent amount in cash (through payments from the Chapter 13 trustee) would be measured by the expected net recovery on a hypothetical surrender of the property securing the lien -- also valued from

the creditor's perspective.

Associates argues that the secured claim amount should be higher if the debtor retains and uses the property. Section 1325(a)(5) does not provide for any bonus to the creditor or penalty to the debtor if the debtor elects to retain and use the property instead of surrendering it. In fact, if the debtor elects to surrender the property through the Chapter 13 plan no judicial valuation of the secured claim is undertaken at all. The secured claim is valued for the purposes of confirming a Chapter 13 plan *only* if the property securing the lien is to be retained and used by the debtor.

Associates' position that the secured claim should be a higher amount is unfounded, but there are other protections granted in the Bankruptcy Code to secured creditors if the debtor elects to retain and use the property. If the debtor retains the property, the secured claim will be paid over time by the Chapter 13 trustee. Section 1325(a)(5)(B)(ii) provides that the *present* value of the secured claim will be paid to the creditor, even if in deferred payments. This means that the secured creditor will receive separate and additional compensation for the delay in payments -- often referred to as payment for the "time-value of money." *Rake v. Wade*, 508 U.S. 464, 113 S.Ct. 2187, 2192 [footnote 8] (1993).

In addition, debtors are required to "adequately protect" the security or the creditor may obtain relief from the automatic stay imposed by 11 U.S.C. § 362 and repossess the property. This adequate protection does not increase the value of the secured claim. Similarly, the compensation for deferred payments (time-value of money) does not increase the value of the secured claim.

This Court, in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 108 S.Ct. 626 (1988), addressed the issue of adequately protecting undersecured or partially secured claims. This Court found that in bankruptcy an undersecured creditor such as Associates does *not* have the right of immediate foreclosure for which it must be compensated if the debtor retains the securing property. The Court found that the secured creditor is entitled to adequate protection (which may be periodic payments on the principal, insurance, etc.) but that additional compensation for being prevented from foreclosing on the asset, the "use value," is ***not permissible***. In essence, that is what Associates is demanding in this case: *additional* compensation because the debtor is allowed to retain and use the truck, contrary to this Court's holding in *Timbers*.

Associates asserts that by receiving payments for its secured claims over time it is forced to assume a risk of non-payment by the debtor and dismissal of the case. Pet. Brief 34. Associates complains that its security interest will thus be jeopardized. This concern is unwarranted, however, because Associates would retain its lien on the vehicle until the secured claim is fully paid. Therefore, if the case is dismissed before full payment of the secured claim, Associates will be able to exercise its lien rights under state law by repossessing the vehicle.

Associates also expresses concern that the vehicle may depreciate faster than Associates will receive payment on the secured claim. Pet. Brief 34. However, this concern fails to take into account that the debtor is required to adequately protect the creditor as to its secured claim and assure that the payments made to the creditor will at least keep pace with the rate of depreciation of the asset securing the claim. If the creditor detects that depreciation is outstripping payments, the creditor is entitled to move for relief from the automatic stay or for an order requiring additional adequate protection. Non-bankruptcy law does not offer this protection for Associates. Outside of bankruptcy, if a borrower's contract payments do not keep pace with depreciation of the property, the creditor would not have the ability to increase the contract payments. The present bankruptcy law was specifically designed to protect the secured creditor from the erosion of the relative value of its security. These provisions completely protect Associates from the risks cited.

C. ASSOCIATES' SECURED CLAIM IS VALUED PURSUANT TO 11 U.S.C. § 506(a)

The amount to be paid to the creditor under § 1325, the allowed secured claim, is valued pursuant to 11 U.S.C. § 506(a).

1. PLAIN MEANING OF § 506(a)

This Court, in *U.S. v. Ron Pair Enterprises*, 489 U.S. 235,

109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), and in *Dewsnup v. Timm*, supra, set forth the process for determining the meaning of federal statutes, and particularly 11 U.S.C. § 506(a). First, the statute is analyzed to ascertain if it has a "plain meaning" consistent with the overall statutory scheme. If the statute is ambiguous and has no "plain meaning" the court reviews the statutory and judicial "slate" which was written upon by Congress in adopting the statute in question. The prior body of law on the issue must be considered to determine whether the questioned statute changed the prior law. If the statute has changed prior law, a review of the statute's legislative history determines whether Congress specifically intended to make that change. In the case *sub judice*, the plain meaning of § 506(a) clearly supports Rash's position.

2. THE FIRST SENTENCE OF § 506(a)

The first sentence of § 506(a) sets out a two-step process for valuing secured claims. In addition, the first sentence provides a creditor with a setoff right to the extent of the value of that setoff. The first step is to determine the "estate's interest" in the property.

(a) The "Estate's Interest"

The filing of a bankruptcy creates a bankruptcy "estate" which, pursuant to § 541, succeeds to the debtor's interests in property. The estate's interest in the asset which secures the creditor's claim defines the scope of the property interest and identifies the asset in question. Beginning the two-step process by identifying the "estate's interest" sets that as an upper limit on the value of the secured claim. See *GMAC v. Valenti*, 105 F.3d 55, 60 (2nd Cir. 1997); *Associates v. Rash*, 90 F.3d at 1043-44 (5th Cir. 1996).

(b) The "Creditor's Interest"

The second step is to value the "creditor's interest" in the "estate's interest" in the property. In the context of § 1325(a)(5)(B), the value of the creditor's interest is measured by the amount the creditor would receive if the debtor surren-

dered the property to the creditor and the creditor exercised its rights under the security agreement or other lien to dispose of the property under applicable non-bankruptcy law.

This Court's decision in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, supra, 108 S.Ct. at 630, affirms that the creditor's property right for which it must be *compensated* is measured only by the underlying value *to the creditor* of its security interest. This Court refused to find any basis for further compensating a partially secured creditor for impairing its *contract* right to immediate repossession and disposition:

> "In subsection (a) of [506] the creditor's 'interest in property' obviously means his security interest without taking account of his right to immediate possession of the collateral on default. If the latter were included, the 'value of such creditor's interest' would increase, and the proportions of the claim that are secured and unsecured would alter, as the stay continues -- since the value of the entitlement to use the collateral from the date of bankruptcy would rise with the passage of time. No one suggests this was intended."

Associates asserts that "it is the collateral that must be valued," implying that the truck itself must be valued rather than the creditor's interest in it. Associates cites the next sentence in *Timbers* in support of its position. As proof of its assertion, Associates claims that "the phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral.'" Pet. Brief 11. Associates asserts that "the value of the collateral" means the amount the debtor would have to pay to replace the asset. Associates' conclusion is without basis because in this context "collateral" has a different meaning than that assumed by Associates.

Associates fails to account for this Court's very next sentence in *Timbers*: "We think the phrase 'value of such entity's interest' in § 361(1) and (2), when applied to secured creditors, means the same [as in § 506(a)]". Section 361(1) and (2) both refer to "the value of such entity's interest in such property", and § 361(3) authorizes the court to grant such other relief ... as "will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property." Therefore, this

Court, in *Timbers*, used phraseology which indicates valuation from the creditor's perspective. This Court's description of the meaning of "entity's interest" in § 361 clearly envisions valuation of the secured claim from the creditor's perspective, not from the debtor's perspective.

Looking more closely at this Court's decision in *Timbers*, the phrase "value of the collateral" is used elsewhere in several places to mean either: 1) "the value of the security interest in the subject property" or 2) the value of the securing property. Given the context of other usages within *Timbers*, it is more likely that when this Court said "value of the collateral," it meant the more precise "value of the *security interest* in the subject property," rather than "value of the subject property itself."

As an example, this Court, in *Timbers* at 629, states that § 362 stays "actions taken to realize the *value of collateral* given by the debtor." [Emphasis added]. "Collateral" in this usage means the "security interest in the securing property." At 633, this Court discusses collateral further:

> "The phrase ['indubitable equivalent'] has developed a well-settled meaning connoting the right of a secured creditor to receive present value of *his security* ... a secured claimant has a right to receive under a plan the present value of *his collateral* [emphasis added]"

Given the overall holding in *Timbers*, it is unlikely that this Court intended to set the secured claim amount determined pursuant to § 506(a) at the value of the securing property to the debtor. This result is even less likely to have been intended considering the fact that in *Timbers* the "value of such creditor's interest" under § 361 ($4,250,000) was described by this Court as "the estimated amount realizable on foreclosure," at 629. And, this value was equated to the "value of such creditor's interest" under § 506(a), at 630.

In *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 1762 (1994), this Court held that it was inappropriate to expect the foreclosure value of a house to be "reasonably equivalent" to the value of it on the open market:

> "An appraiser's reconstruction of 'fair market value' could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold within those strictures is simply *worth less*."

Associates' assertion that the value of its interest in the truck (a foreclosure value) equals the value of the truck on the open market -- its replacement or retail value -- is equally incongruous. In light of the holding in *BFP*, the creditor's interest simply cannot be equivalent to the value of the property on the open market or in the hands of the debtor.

In *Butner v. United States*, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), this Court held that unless otherwise provided in federal law, property interests including security interests are created, defined and applied under state law (or non-bankruptcy law) rather than federal bankruptcy law. Therein lies the requirement to apply state commercial statutes to determine the value to the creditor of its security interest given its rights and responsibilities in repossessing property securing the debt, disposing of it, and accounting to the debtor for the proceeds of that sale. *Rash*, 90 F.3d at 1042; *NBD Bank v. Hoskins*, 102 F.3d 311, 316; 317-318, (7th Cir. 1996), J. Easterbrook concurring.

No portion of § 506(a) or § 361(1), (2), or (3) calls for the valuation of the asset securing the debt, nor does any such provision call for a valuation of the cost to the debtor to replace the securing asset. If Congress meant to value the "debtor's interest" in the property rather than the "creditor's interest" in these sections, it could have said so easily. It did use that term in other sections of the Bankruptcy Code including §§ 363(l), 522(d), and 541. In *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 114 S.Ct. 1588, 1593 (1994), this Court held that:

> "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another."
> [internal quotation marks omitted, as cited in *BFP v. Resolution Trust Co.*, 511 U.S. 531, 114 S.Ct. 1757, 1761 (1994)]

Similarly, if Congress intended, for the purpose of § 1325(a)(5)(B), that the secured claim equal the value to the

debtor of the "property securing such claim" it would have written § 1325(a)(5)(B)(ii) to read "the value to the debtor of the debtor's use of the property securing such claim."

(c) Section 553 Setoffs

Section 506(a) also provides that a creditor's claim is secured to the extent it is subject to setoff under § 553. The creditor's secured claim is valued at the amount the creditor would otherwise owe to the debtor (from the creditor's perspective), although application of the setoff requires the creditor to first obtain relief from the automatic stay. A creditor's right to setoff a debt he owes to the debtor can be traced far back in time as a corollary to the Bankruptcy Rule (see *infra*). See *Scott v. Armstrong*, 146 U.S. 499, 511, 13 S.Ct. 148, 151 (1892).

3. The Second Sentence of Section 506(a)

(a) "Such value"

The second sentence begins with "Such value," thus referring back to the value established in the first sentence of § 506(a). The meaning of the second sentence must elaborate on the valuation process set forth in the first sentence. The second sentence cannot be read to negate the first sentence, which would be the result of adopting the creditor's meaning of the second sentence.

In *Rake v. Wade*, 508 U.S. 464, 113 S.Ct. 2187, 2192 (1993), this Court noted that: "We generally avoid construing one provision in a statute so as to suspend or supersede another provision." See also *Ex Parte Public Nat. Bank of New York*, 278 U.S. 101, 104, 49 S.Ct. 43, 44,73 L.Ed. 202 (1928) (quoting *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115, 25 L.Ed. 782 (1879)). This principle of statutory construction must apply even more certainly to two sentences within the same code section. See also *United States v. Nordic Village Inc.*, 503 U.S. 30, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992).

(b) "In light of"

Congress intended that courts take the factors mentioned in

the second sentence into consideration when valuing a secured claim. Congress recognized the full spectrum of circumstances in which secured claim valuations might occur. Congress wisely understood the difficulty of prescribing a precise formula that would equitably apply in all circumstances. The second sentence is not intended to contradict the first sentence, but rather to enhance its meaning.

The phrase "in light of" allows the judge discretion, and does not bind the court to a valuation based upon the debtor's proposed use of the property. As the court in *Speck v. United States*, 104 B.R. 1021, 1023 (D.S.D. 1989), stated: "While the use proposed by the debtor should be considered in determining the value of collateral, the bankruptcy judge should not have his hands tied."

(c) The "Purpose of the Valuation"

A § 506(a) valuation for the *purpose* of determining the amount to be paid on a secured claim pursuant to § 1325 is only one of many such purposes. Other possible purposes include: 1) determining a debtor's eligibility for Chapter 13 protection under § 109(e); 2) assessing adequate protection for a creditor requesting stay relief under § 362; 3) assessing adequate protection or dividing the proceeds where a debtor proposes a disposition or use other than in the ordinary course of business under § 363; 4) determining whether a preference occurred under § 547; 5) fixing the redemption amount due to the creditor pursuant to § 722; and 6) determining confirmability of Chapter 11 and Chapter 12 plans. As noted in 506(a)'s legislative history [S. Rept. No. 95-989 to accompany S. 2266, 95th Cong., 2d Sess. (1978)]: "To illustrate, a valuation early in the case in a proceeding under sections 361-363 would not be binding upon the debtor or creditor at the time of confirmation of the plan."

This legislative history was based upon the pre-Code rule. Under the 1898 Bankruptcy Act, valuing secured claims early in a case was necessary to determine the voting rights of partially secured creditors who could only vote based upon the unsecured portion of their claim. 3 *Collier on Bankruptcy* (14th ed. 1977) ¶ 56.07. The Chandler Act amended § 57(e) of the 1898 Act to

provide that the "value of [secured creditors'] securities may be valued *temporarily*" [emphasis added] in order to enable partially secured creditors to participate in creditors' meetings. 3 *Collier* (14th ed. 1977) ¶ 57.01[2.1].

Therefore, the concept of permitting different secured claim valuations at different stages of the case is historically based, and Congress intended to retain that flexibility when § 506(a) was drafted. See also *In re Pine Gate Assoc.*, 3 B.C.D. 301 (N.D.Ga 1977) which also illustrated the need for flexibility in valuation, particularly for different purposes in a case.

(d) The "Proposed Disposition or Use"

The few decisions that have held that "retail" valuation of secured claims is mandated by § 506(a) state that the second sentence of § 506(a) has no meaning whatsoever if expected net recovery upon hypothetical repossession or surrender will apply in all cases. These decisions refuse to recognize that some types of securing property do in fact have substantially different values if used in different ways. One example of real property which falls into this category is land which could be used for farming (lower value) or residential development (higher value). See *In re Foster*, 79 B.R. 906 (Bankr.D.Mt. 1987) which valued the secured claim based upon the debtor's lower-valued use; but see *In re Ehrich*, 109 B.R. 390 (Bankr.D.S.D. 1989) and *In re Sherman*, 157 B.R. 987 (Bankr.E.D.Tex. 1993) where the secured claim was set at a higher-value use than that proposed by the debtor.

And, even within the category of farm land, there are uses which result in different values: pasture land (lower value) versus crop land (higher value). An example of how the proposed "disposition or use" will change the value of a secured claim is contained in *Speck v. United States*, 104 B.R. 1021 (D.S.D. 1989). In *Speck*, in the context of a Chapter 12 plan confirmation the Court held that the farm land need not be valued at the use proposed by the debtor -- pasture land -- but valued it at the higher value of crop land for which it was also suited.

Speck is an excellent example of how the Bankruptcy Code, particularly § 506(a), gives bankruptcy courts the power to cause

the debtor to make reasonable economic use of the securing asset. In practice, the fact that the second sentence of § 506(a) does not "tie the judge's hands" carries out the intent of Congress to allow the debtor flexibility in proposing a particular use of a securing asset, but also assures the creditor that an economically infeasible use can be disapproved.

Different possible leases can define different uses and corresponding values for a particular property also. For example, leasing out individual apartments in a building is a different use than leasing out the building as a whole, and these uses can produce different values for the underlying building. See 6 *Collier on Bankruptcy* (14th ed. 1977) ¶ 3.27. Another example under the Act where the proposed use by the debtor or trustee was important in determining the value of secured claims (6 *Collier on Bankruptcy* (14th ed. 1977) ¶ 9.12) involved valuing yarn as waste torn from machinery or as in saleable condition. *In re Meinhard, Greef & Co. v. Edens*, 189 F.2d 792 (4th Cir. 1951).

Creditors secured by different types of real property, business products, or combinations of business equipment are familiar with the impact of the debtor's proposed use on the value of their particular type of security. A vehicle lender, such as Associates/Ford Motor Credit, may view § 506(a) only from the perspective of the type of property securing its claims and may not be able to imagine the meaning and use of the second sentence of § 506(a). Regardless of whether a vehicle is driven for personal or for business use, its value will normally not increase or decrease. A car that is converted for use as a taxi may have less value than a similar car used for personal transportation. But in most cases, a vehicle's value will not vary due to the use proposed by the debtor. And, because the debtor's type of use of a vehicle does not normally affect its value, Associates incorrectly looks elsewhere to find meaning for the second sentence of § 506(a).

One example of another type of "disposition or use" is a sale by the trustee or debtor after plan confirmation and during the course of the case by judicial sale or a voluntary negotiated sale. Similar to the 1898 Act, the 1978 Bankruptcy Code envisioned

the possibility that a proposed sale later in a case could be at a higher price than reflected in an earlier valuation of a secured claim under § 506(a), such as for the purpose of confirming a Chapter 13 plan under § 1325. Congress intended to assure that the secured creditor was not prejudiced by an *earlier valuation* of the secured claim. In a sale later in the case, the creditor could receive up to the full payment on the debt if proceeds are available (after crediting the debtor for payments made on the secured claim, other contributions, and appreciation).

Section 363(k) provides a secured creditor the right to bid at such a sale of the securing asset proposed by the trustee or debtor, including a sale "free and clear" of the partially secured creditor's interests. The right of a secured creditor to bid at a sale of the securing asset is an historically important right that Congress sought to protect in drafting the second sentence of § 506(a) in order to protect the partially secured creditor's property interest (its security interest). *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937); and *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273 (1940). Understanding of this important purpose and corresponding Congressional intent in drafting the second sentence of § 506(a) has been absent from the analyses by the courts which have adopted the retail, mid-book, or similar positions.

Creditors have said that the debtor may decide not to simply retain and use the vehicle, but may later sell the vehicle at retail value and pocket the profit. This could not happen, however. If the debtor sold the vehicle later, the creditor would be entitled to a new § 506(a) valuation. This is because court approval of a § 363 voluntary sale is a *different purpose* of valuation than a § 1325(a)(5)(B) valuation. And in any case, the debtor would not be able to sell the vehicle for retail value. Retail value is what a car dealer can expect his professional staff to obtain and which an individual cannot expect to obtain. Retail value includes a markup for the car dealer's costs in maximizing the sales price.

Petitioner and Petitioner's *amicus curiae* (American Automobile Manufacturers Association [AAMA]), have questioned

how a particularly detrimental use of the security should affect the valuation of the secured claim. Pet. Brief 15-16. AAMA's Brief 12, fn 4. While the proposed use should be considered by the court in valuing the creditor's secured claim, this *amicus* agrees with Petitioner that a highly depreciating use, if approved by the bankruptcy court, would require higher adequate protection payments to the creditor under §§ 361 and 363, but would not increase the value of the secured claim. This result would require the debtor to pay the secured claim faster in order for the payments to at least keep pace with the depreciation.

Associates (Pet. Brief 13-14) asserts that its claim should not be valued on a "theoretical 'disposition'" by the creditor if the debtor is retaining the asset. However, in all cases where the debtor is retaining the asset, the valuation must necessarily be based upon a hypothetical (theoretical) event. Associates' argument that valuing the secured claim should be based upon Rash's retention of the truck is flawed, because Associates' view also envisions a hypothetical event -- a purchase by the debtor. And, while there is much statutory authority for using the hypothetical recovery to the creditor, there is *no* statutory authority for using the hypothetical cost of replacement to the debtor. Both views are hypothetical by necessity because the property is not in fact being sold.

As has been shown, Congress intended different methods of valuation to be used for different purposes. *Expected net recovery upon hypothetical surrender of the collateral* is the appropriate measure where the debtor elects to retain the security and allows the creditor to retain its lien pursuant to § 1325(a)(5). This method of valuation is appropriate because it measures the creditor's interest in the estate's interest, it considers the proposed normal use of the truck, and it is also equivalent to the alternative form of payment to the creditor under § 1325(a)(5)(B) -- "in kind" which would be a surrender of the collateral.

4. Inapplicability of "Going Concern Value"

Some cases have found that the proper standard for valuing a secured claim should be the "going concern value." Most of these cases are Chapter 11 or 12 cases where the security is, in

fact, a "going concern," secured by an operating business or an operating farm which could be sold as a functioning unit by a foreclosing creditor. In these cases, the "going concern value" is the value the entire operating business would realize if sold intact. This "going concern" value is contrasted with the liquidation value that would be realized if each individual asset of the operating business was disposed of separately.

The concept of "going concern" was described by this Court in connection with a railroad reorganization, in *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 671, 55 S.Ct. 595, 79 L.Ed. 1110 (1935):

> "A railway is a unit; it can not be divided up and disposed of piecemeal like a stock of goods. It must be sold, if sold at all, as a unit and as a *going concern*." [Emphasis added].

Associates' only security is Rash's truck. 90 F.3d at 1039. "Going concern value" is completely inapplicable in this case, because there simply is no other security beyond the vehicle itself.

In *Timbers*, the creditor had an unperfected (and therefore unenforceable under the then-applicable Bankruptcy Code) assignment or lien on rents of the apartment building in addition to a security interest on the building itself. This Court held that to pay an undersecured creditor additional compensation for the delay in foreclosure would have the effect of creating for the undersecured creditor a previously nonexistent security interest -- a *perfected* lien on future proceeds, product, offspring, rents, or profits.

Associates does *not* hold a lien on future proceeds such as Rash's operating lease or his income produced under the lease. Applying this Court's holding in *Timbers* to the facts in this case, no lien on Rash's future income should be created where it does not in fact exist. This Court pointed out the inequitable nature of such a result, vis a vis other legitimately secured creditors, in *Timbers*, at 631-2: "the undersecured creditor who lacks such a perfected security interest [in post-petition rents and proceeds] in effect [would achieve] the same result by demanding the 'use value' of his collateral under § 362." To grant Associates the

equivalent of a security interest on the post-petition rents or Rash's own future personal services would be inconsistent with this Court's ruling in *Timbers*.

Associates is asking this Court to require Rash to pay extra for the continued use of the truck -- like the "use value" requested by the creditor in *Timbers*. If Rash were required to pay Associates for the use of the truck, the value of the secured claim would be -- as noted in *Timbers* -- an ever-increasing amount. In *Timbers*, at 630, this Court addressed the possibility of a secured claim that would increase in value over time and rejected the idea that Congress would have intended such a result.

D. THE PRE-CODE RULE SUPPORTS RASH'S POSITION

1. The "Bankruptcy Rule" When Liquidation Was the Only Generally Available Form of Bankruptcy Relief

While a bankruptcy debtor was able to propose composition reorganization plans as early as 1874, reorganizations were rare until the great depression of the 1930s. Before the 1930s, the generally available form of bankruptcy relief involved the liquidation of assets of the debtor.

In liquidation bankruptcies, estate assets were distributed pro-rata on unsecured claims. Secured creditors were only allowed to receive dividends from estate proceeds based upon the unsecured portions of their debt. In order to determine the unsecured portion, secured creditors were required to repossess and dispose of the secured collateral and account for the proceeds. This process of accounting for the actual proceeds of the collateral in determining the remaining unsecured claim was referred to as the "bankruptcy rule." The Bankruptcy Rule was the origin of the rule now applicable in Rash's case.

Applying old English and nineteenth century American bankruptcy law to Rash's case, Associates would not share in the dividends to creditors from the bankruptcy estate unless it recovered and sold Rash's truck and accounted for the proceeds.

The Bankruptcy Rule, part of the legal tradition over several centuries, has served the purpose of assuring that partially secured creditors do not receive a disproportionate percentage of the limited dividends available to creditors. The method of

valuing the secured portion of the claim under early liquidation bankruptcy proceedings was from the creditor's perspective, as proposed by Rash in this case.

2. The "Bankruptcy Rule" Applied in Reorganization Bankruptcies

Under bankruptcy reorganization provisions, the protection intended by the Bankruptcy Rule was expanded to include protection for the debtor as well as the general unsecured creditors, against secured creditors. Because of the massive numbers of foreclosures and business failures in the 1930s, Congress sought to improve and create new alternatives to liquidation bankruptcies. Equity reorganizations outside of bankruptcy were used as a starting point for creating new relief inside of bankruptcy.

In developing the concept of reorganization, Congress and the courts experimented with ways of compensating the secured creditors for their property interests consistent with the Fifth Amendment without requiring liquidation of the security. The goal of reorganization was to allow the debtor to reorganize by retaining its assets.

In developing a way of properly compensating the secured creditor to avoid a taking under the Fifth Amendment, the courts and Congress valued secured claims as described below, with each new step providing better protection of the creditor's property (security) interest. Over time, the amount the secured creditor was found to be entitled to realize developed, as follows: 1) first, set at the amount of an actual judicial sale of the security; 2) then set by an appraisal of the property to establish the amount expected at a judicial sale; 3) then set by allowing the creditor to bid in its full claim at a judicial sale; and 4) finally set at the expected net recovery by the creditor upon surrender of the security (which would be the maximum amount a partially secured creditor would be willing to bid in at a judicial sale of the security).

In 1934, Congress amended the 1898 Bankruptcy Act by enacting the Frazier-Lemke Act to provide for bankruptcy reorganizations. These new provisions were found to effect a taking in violation of the Fifth Amendment for two basic reasons: 1) the

creditor's property interest (security interest) was substantially impaired because foreclosure was prevented and the value of the security interest was to be established only by appraisal of the hypothetical judicial sale amount; and 2) the provisions were effective only retrospectively. It was held that a secured creditor could not be deprived of his right to a judicial sale. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S.Ct. 854, 79-L.Ed. 1593 (1935), *Collier on Bankruptcy* (14th ed. 1977) Vol. 6A, ¶ 10.16.

Shortly thereafter, Congress enacted corrective legislation which allowed the partially secured creditor to bid in at any actual sale of the property -- up to the full amount of its claim -- regardless of the prior valuation by appraisal. This was thought to protect the creditor's property interest because it was assured the right to obtain the property for a bid of what it believed it could recover in its own disposition of the asset. This Court validated the amended Frazier-Lemke provisions in the two *Wright* cases: *Wright v. Vinton Branch of the Mountain Trust Bank*, 300 U.S. 440 (1937) and *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273 (1940).

Valuation of a secured claim based upon an appraisal of hypothetical *judicial* sale proceeds became the logical result of protecting the creditor's property rights while allowing the debtor to retain the securing asset. The development of the concept of using appraisals to determine the hypothetical judicial sale value of securing assets is discussed in 6A *Collier on Bankruptcy* (14th ed. 1977) ¶ 10.16.

In 1938, Congress passed the Chandler Act which incorporated and improved some of the elements of equity receivership and prior amendments to the Bankruptcy Act, adding Chapters X, XI, XII, and XIII (a reorganization provision for individual wage-earners). Chapter X provided debtors with the most powerful provisions relating to the treatment of secured claims.

Valuation of secured claims under Chapter XIII was governed by Rule 13-307(d). With regard to that Rule, *Collier* explains: "the court may use any of the modes for determining the value of security specified in § 57h (*i.e.*, by converting the collateral into money according to the terms of the security

agreement ...)." *Collier on Bankruptcy* (14 ed. 1977), Vol. 15, ¶ 13-307.07-08. Here again, valuation of secured claims was viewed from the creditor's perspective.

Partially secured creditors preferred and promoted low secured claim valuations under the 1898 Bankruptcy Act and Bankruptcy Rule because they did not receive distributions on secured claims. They did, however, receive distributions on unsecured claims, and thus had an incentive to maximize the unsecured claim and minimize the secured claim. In the hands of partially secured creditors, low valuations of secured claims were accompanied by significant leverage as against the debtor which could force full repayment of the debt regardless of the secured claim valuation. The debtor enjoyed limited protection from the bankruptcy court with regard to secured claims.

E. LEGISLATIVE HISTORY OF THE 1978 BANKRUPTCY CODE SUPPORTS RASH'S POSITION

Under the Bankruptcy Act of 1898, as amended in 1938, secured creditors had both more powers and fewer rights than before the 1930s. The realization of Congress' objective to protect the substantive property rights of secured creditors yet allowing debtors to retain and use the security was imperfect, however. Many problems developed in the treatment of secured claims in the context of bankruptcy reorganizations. Some secured creditors could veto Chapter XIII plans by which they were essentially unaffected. In other cases, however, secured creditors were restrained from foreclosing on the security while also being prevented from collecting any payments. See *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc.No. 93-137, 93rd Cong., 1st Sess., Part I, p. 165-166, 174; Part II, p. 131, 207-208 (1973).

The Commission intended to: 1) assure secured creditors that the plan would either provide for the surrender of the security or equivalent compensation for the security; and 2) to prevent the secured creditor from vetoing such a Chapter 13 plan.

This Court has stated that in order to effect a major change to a pre-Code practice, the change would have to be "the subject of at least some discussion in the legislative history." *Dewsnup v.*

Timm, 502 U.S. 410, 112 S.Ct. 773, 779, 116 L.Ed.2d 903 (1992). Regarding Chapter 13 plans, the House Report states that an important change is in the treatment of secured creditors. 90 F.3d at 1056. The House Report "expresses an intent to protect the creditor's right to *realize* the value of its secured claim." The Report proceeds to discuss the change:

> "Current chapter XIII does little to recognize the differences between the *true value* of the goods and their *value as leverage*. Proposed chapter 13 instead views the secured creditor debtor relationship as a financial relationship, and not one where extraneous, non-financial pressures should enter." [Emphasis added]. H.R. Rep. No. 95-595, at 124

Responding to the problems experienced following the Chandler Act, Congress provided protections for both debtors and secured creditors in § 1325(a)(5) and § 506(a), enacted in 1978. Congress sought to assure that Chapter 13 debtors could retain their property, and also sought to assure payment to secured creditors of the value to them of their security interest. Congress gave no indication of an intent to change the traditional method of valuing secured claims from the creditor's perspective. Instead, the important change involved reducing the unfair leverage exercised by secured creditors in preventing the success of Chapter XIII.

Congress did not "write on a clean slate" in drafting § 506(a). It enacted § 506(a) incorporating with it the lengthy history of secured claim valuation practice dating back the Henry VIII, with no mention at any time of any intent to create a new method of valuing secured claims which would require the debtor to pay replacement value.

Portions of H.R. Rep. No. 95-595 discussed the treatment of secured claims. See 90 F.3d at 1055-1059. The Report stated (at 181):

> "Secured creditors have exercised great leverage by virtue of the uncertainty, and have made reorganization and individual repayment plans more difficult to consummate than would be the case under this bill."

In *Timbers*, supra, this Court cites this page (p. 181) of the

House Report in support of its statement that "the phrase 'value of such creditor's interest' in § 506(a) means 'the value of the collateral,'" at 630. In refusing to allow the creditor in *Timbers* payment for the "use value" of the property, this Court was implementing Congressional intent *not to* over-compensate partially secured creditors due to their leverage.

The legislative history of 11 U.S.C. § 361 also shows Congress' intent to continue the pre-Code rule regarding the valuation of secured claims. Both Senate and House Reports regarding the 1978 Code make clear Congress' intent to protect secured creditors against depreciation and waste so as to assure that they would realize the value of their security interest. See H.Rept. No. 95-595 to accompany H.R. 8200, 95th Cong., 1st Sess. (1977) pp. 338-340; S. Rep. No. 95-989 to accompany S. 2266, 95th Cong. 2d Sess. (1978), pp. 49, 53, 54.

Throughout the legislative history, the creditor's interest is repeatedly the focus of protection. Nowhere in the legislative history of § 361, § 506(a), § 1322, or § 1325, is there any reference to valuing secured claims based upon the benefit conferred on the debtor by the securing assets. The legislative history regarding § 361 provides clarification regarding the meaning of § 506(a) because in *Timbers* supra, this Court equates the phrase "value of such creditor's interest" in § 506(a) with "value of such entity's interest" in § 361(1) and (2).

F. CONGRESSIONAL ACTION SINCE THE ADOPTION OF THE 1978 BANKRUPTCY CODE SUPPORTS RASH'S POSITION

In 1981, the Senate Judiciary Subcommittee on Courts held hearings on the Bankruptcy Code. Within a period of fourteen months, two separate bills were introduced [S. 2000 (1981) and S. 445 (1983)], both of which included an amendment to § 506(a) that would have codified the use of retail value for the purpose of valuation under § 1325(a)(5)(B). Both times these amendments were rejected. See *Collier on Bankruptcy*, ¶ 506.03 at 506-13 to 506-14 (15th ed. 1996).

By the early 1980s, partially secured creditors had discovered that under the Bankruptcy Code they no longer had the

leverage to enforce full payment on their debts and in response, a creditor initiative was launched to have Congress ratify a new "intent" regarding the valuation of secured claims. The attempt failed. Congress repeatedly refused to adopt this language.

Associates should not be allowed to use the courts to effect a revision to the Bankruptcy Code which had previously been considered and rejected by Congress. See *Bennett v. Kentucky Dept. of Education*, 470 U.S. 656, 665 at n. 3, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985) (rejection of an amendment by a later Congress has persuasive value when construing a statute); *New York Telephone Co v. New York Dept. of Labor*, 440 U.S. 519, 544 at n. 44, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979) (repeated rejection of a position by Congress considered in construing a statute).

When a particular statutory interpretation has been explicitly brought to the attention of Congress, as here, and where Congress has not sought to alter that interpretation despite amending the statute in other respects, then "presumably the legislative intent has been correctly discerned." See *North Haven Board of Education v. Bell*, 456 U.S. 512, 535, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

G. RASH'S PLAN MEETS THE GOOD FAITH REQUIREMENT OF § 1325(a)(3)

Associates fears that a decision of this Court upholding the *en banc* Fifth Circuit opinion will result in debtor abuse of the cram down right. Pet. Brief 37-38. Associates fails to consider that pursuant to § 1322 the debtor's Chapter 13 plan must be proposed in "good faith" in order to be confirmed by the bankruptcy court. If a debtor purchases and finances a vehicle while intending to immediately file Chapter 13, the creditor can object to plan confirmation on the basis of the debtor's lack of "good faith." The present law was carefully written to provide protections for creditors in just such a situation. Creditors in general do not hesitate to object to plan confirmation if they believe the debtor has sought Chapter 13 relief in "bad faith."

Rash filed his Chapter 13 plan in "good faith" after having made a substantial down payment on the purchase price and

having made nearly three years of monthly payments on Associates' loan. 90 F.3d at 1038-1039.

H. RASH'S CRAM DOWN OF ASSOCIATES' CLAIM IS NOT A "TAKING" OF A PROPERTY INTEREST

In *Wright v. Vinton Branch*, supra, *Wright v. Union Central Life*, supra, and *In Kuehner v. Irving Trust Co.*, 299 U.S. 445, 57 S.Ct. 298, 81 L.Ed. 340 (1937), this Court allowed the modification of contract rights of secured creditors while still protecting their property rights in bankruptcy reorganizations. More recently, this Court found household goods lien avoidance pursuant to 11 U.S.C. § 522(f) (not applicable in the case *sub judice*) in *U.S. v. Security Industrial Bank et al.*, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) to be a permissible modification and impairment of the secured creditor's rights.

Under § 1325, the amount of money recovered on the contract is reduced to the net value of the creditor's property interest and the creditor retains its lien until the secured claim is fully paid. The creditor also holds an unsecured claim for any deficiency. While the creditor is not allowed to repossess the security, the creditor is being fully compensated for its property interest because it is being paid the amount it would have recovered had it repossessed and disposed of the security (the amount of the secured claim). And although the creditor is not allowed to *immediately* realize the expected net recovery on repossession and disposition, the creditor is fully compensated for the delay in payments by receiving additional payments above and beyond the secured claim amount -- the "time-value of money." In fact, pursuant to protections provided by § 1325(a)(5), the creditor's property interest is completely intact. If the case is dismissed, the creditor can repossess pursuant to non-bankruptcy law based upon the lien it has retained.

I. PRACTICAL PROBLEMS WITH ASSOCIATES' POSITION

Associates proposes that this Court adopt valuation standards that vary with the market in which the goods are normally sold. Pet. Brief 22. Under Associates' view, assets which are

"typically purchased from a retailer" should be valued at "retail" value, while used household goods could be valued at prices obtained in "flea markets, rummage sales, or through classified advertisements ... ."

Associates continues: "if the debtor is a retailer who buys for resale at wholesale prices, the relevant market is the wholesale market, and wholesale value would be proper." Pet. Brief 22. Why Congress would prefer a debtor, simply because he is a retailer, by giving him a lower secured claim valuation is hard to understand. Associates then proposes that a consumer-debtor should pay a higher secured claim based upon retail valuation. In neither of these cases is the partially secured creditor's property interest (security interest) being valued so that it can be paid through the Chapter 13 plan. Why would Congress have intended a car-dealer debtor to pay a lower secured claim on a car loan than a normal consumer debtor? Not only is this result puzzling, but it contradicts the explicit intent of Congress to allow consumer debtors to retain their assets in exchange for compensating the creditor for its security interest. While "retail" value for vehicles would benefit Associates, this proposal lacks any support in the statutory language, legislative history, or pre-Code rule.

Section 506(a) does not call for the simple valuation of the property which secures the claim. What is to be valued is more complex -- the creditor's interest in the estate's interest in that property. Furthermore, § 506(a) does not call for valuation of the property serving as security *in the hands of a car dealer*, from the point of view of either a car dealer buying or selling the vehicle.

Valuing the secured claim at "retail" would grant a windfall to the secured creditor not contemplated in either bankruptcy or non-bankruptcy law. Nor is retail value equivalent to the replacement value of the collateral. A debtor may replace a vehicle by purchasing one from a car dealer at retail value, or the debtor may replace it by purchasing one from a neighbor, relative, or through classified advertisement, for significantly less than a dealer would charge. A debtor could even purchase a vehicle at an auction of repossessed vehicles.

Associates' claim that replacement value to the debtor is the value of the truck to the debtor (Pet. Brief 22) neglects the equitable interest Rash owns in the truck. The debt owed by Rash exceeds the value of the truck, and therefore Rash does not have any monetary equity in the truck. But, Rash does own an *equitable* interest in the truck, and he has the right to continued possession and use of it while under the protection of the Bankruptcy Court. This equitable interest owned by Rash results from his trade-in of a prior truck, his monthly payments made to Associates directly before filing the Chapter 13 petition, and monetary investments by Rash in maintaining and insuring the vehicle. Rash's equitable interest in his truck would be completely taken from him if Associates prevails in this case.

Furthermore, the value of the property to the debtor is its "use value" -- which does not necessarily equal the cost to replace the item by the debtor. For example, a measure of the value of the vehicle to the debtor is the future income produced by the debtor as a result of keeping the security. In the case *sub judice*, by keeping the truck Rash is able to continue working as a truck driver. Yet, the income he produces (reflected in the lease payments to Rash) more clearly relates to the post-petition personal services he performs as a truck driver and which should not cause the secured claim of the creditor to increase.

In most Chapter 13 cases, debtors use their vehicles primarily for transportation to and from work, and do not use the vehicles to produce income directly. It could be argued that the value of the vehicle in this situation is rental value of the vehicle for each month it is used by the debtor post-petition. As pointed out by this Court in *Timbers*, at 630, to value the secured claim based upon an ever-increasing amount such as "rental cost" or "stream of payments" is not likely to have been the Congressional intent.

Any proposal that would adopt "book" value for vehicles would be fraught with problems. Numerous valuation books are published with attendant variations in prices. Usually only one of them is commonly used in any particular area. Accordingly, the use of "books" will create different values for same car and same lender in different locations.

An adoption of "book" valuation completely ignores the

language of § 506(a) because it values the vehicle from the point of view of a car dealer. Low book is normally defined as the price a dealer would pay for the vehicle, and high book is normally the price at which the dealer would sell the vehicle. Midbook has no statutory basis either; it is simply a way some courts have found to avoid "unfairness" to either party. In addition, the proposal of a book-based valuation standard completely ignore the fact that there are many types of property for which there are no "books".

On the other hand, implementation of the Fifth Circuit's decision would be easily accomplished. As can be imagined, consumer debtors do not have the financial capacity to litigate valuation issues on a case-by-case basis. Inevitably, regional shortcuts will be developed which will approximate, for each lender, its estimated recovery on repossessions. Simple statistical analysis could show that a lender typically recovers an average percentage on repossession. For example, a quick review of complaints for deficiency judgments under state law filed by the lender in each area would be a way of determining its recovery. That value could be expressed as a percentage of the vehicle valuation publication used in that area. Debtors will likely agree to such an approximation of the expected net recovery by the lender as a practical mechanism for establishing vehicle valuations pursuant to § 1325(a)(5)(B).

VIII. CONCLUSION

In conclusion, NACBA does not find either § 506(a) or § 1325(a)(5)(B) to be ambiguous. However, if this Court finds ambiguity, this Court has specifically considered possible statutory ambiguity with regard to the competing interests of a partially secured creditor and a bankruptcy reorganization debtor in *Wright v. Union Central Life Insurance Co.*, 311 U.S. 273 (1940). At 278-281, this Court held that:

> Safeguards were provided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property. ... There is no constitutional claim of

the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress ... lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act. ... Under our construction, however, the debtor will be given the benefit of an express mandate of the Act. And the creditor will not be deprived of the assurance that the value of the property will be devoted to the payment of its claim. ... Such an important remedial right [fundamental statutory right to redeem at the reappraised value or at the value fixed by the court] cannot be lost by mere implication. And to hold that the court has the discretion to deny or to grant the debtor's right to redeem ... dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate."

Amicus urges this Court to affirm in its entirety the excellent opinion of the Fifth Circuit *en banc*.

Dated: March 26, 1997 Respectfully submitted,

NORMA L. HAMMES*
JAMES J. GOLD
Attorneys for *amicus curiae*
NATIONAL ASSOCIATION OF
CONSUMER BANKRUPTCY
ATTORNEYS, INC.

* Counsel of Record

APPENDIX

1898 Bankruptcy Act

11 U.S.C. Chapter 10, § 616. A plan of reorganization under this chapter --

(1) shall include in respect to creditors generally or some class of them, secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

...

(10) shall provide adequate means for the execution of the plan, which may include: the retention by the debtor of all or any part of its property; the sale or transfer of all or any part of its property to one or more other corporations theretofore organized or thereafter to be organized; the merger or consolidation of the debtor with one or more other corporations; the sale of all or any part of its property, either subject to or free from any lien, at not less than a fair upset price and the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein; the satisfaction or modification of liens; the cancelation [sic] or modification of indentures or of other similar instruments; the curing or waiver of defaults; the extension of maturity dates and changes in interest rates and other terms of outstanding securities; the amendment of the charter of the debtor; the issuance of securities of the debtor or such other corporations for cash, for property, in exchange for existing securities, in satisfaction of claims or stock or for other appropriate purposes;

....

1978 Bankruptcy Code

11 U.S.C. § 361. Adequate protection. When adequate protection is required under section 362, 363, or 364 of this title

of an interest of an entity in property, such adequate protection may be provided by-

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 506. Determination of secured status.

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void unless-

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 1322. Contents of plan.

(a) The plan shall-

(1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may-

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated, however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;

(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity; and

(10) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law-

(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

(d) The plan may not provide for payments over a period

that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.

(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default [SIC] shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

11 U.S.C. § 1325. Confirmation of plan.

(a) Except as provided in subsection (b), the court shall confirm a plan if-

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan-

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b) (1) If the trustee or the holder of an allowed unsecured

claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended-

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.